

1 Unresolved Issues Relating to the Proposed CC&N

2 The City has reviewed the Commission's docket for this matter, as well as a transcript
3 from the February 18, 2009 hearing before Administrative Law Judge Kinsey. This review
4 makes clear that the interests of the City of Scottsdale and other municipalities, counties, and
5 towns in the state of Arizona are not adequately represented. The process so far has not been
6 sufficient to present a full understanding of the issues surrounding the application for a
7 statewide CC&N by NewPath. Among other things, the City does not believe that adequate
8 consideration has been given to the effect of federal preemption of the Commission's
9 jurisdiction over wireless service providers. 47 U.S.C.A. § 332(c) provides:
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12 3) State preemption

13 (A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local
14 government shall have any authority to regulate the entry of or the rates
15 charged by any commercial mobile service or any private mobile service,
16 except that this paragraph shall not prohibit a State from regulating the
17 other terms and conditions of commercial mobile services.

18 (Emphasis added.) Both NewPath and NextG have filed documents with this Commission
19 indicating that all or at least a portion of their offerings involve the provision of mobile
20 services within the meaning of the Federal Telecommunications Act. The record in these
21 proceedings does not indicate that consideration has been given to the preemptive effect
22 which § 332(c)(7) may have on the Commission's authority to issue a CC&N to a DAS
23 provider such as NewPath.

24 A second issue which does not appear to have been given adequate consideration is
25 whether or not NewPath is a "public service corporation" within the jurisdiction of the
26 Commission. A review of NewPath's application to this Commission indicates that questions

1 exist whether NewPath meets the test for a public service corporation as announced by such
2 cases as *Arizona Corporation Commission v. Nicholson*, 119 Ariz. 257, 259, 580 P.2d 718,
3 720 (1978) ("To be a public service corporation, its business and activity must be such as to
4 make its rates, charges, and methods of operations a matter of public concern. . . .").³ The
5 record indicates that no interested party has given this question thorough analysis.
6

7 **The City Should Be Granted Permission to Intervene**

8 AZ ADC R14-3-105 provides for intervention by interested persons upon an order
9 from the Commission or presiding officer. As outlined above, there are material questions
10 regarding the scope and extent to which NewPath should be granted a CC&N, if at all. Any
11 CC&N issued by this Commission to NewPath may substantially affect the interests of the
12 City of Scottsdale and other political subdivisions of the Arizona government similarly
13 situated.⁴ While an application for intervention is not the proper vehicle for the Commission
14 to make a final determine of the issues identified herein, it is clear that the issues related to
15 federal preemption and whether or not NewPath is a public service company within the
16 Commission's jurisdiction should be decided before any CC&N is issued. The interests of the
17 public and the City of Scottsdale in relation thereto are not currently being represented in
18 these proceedings. Therefore, the City respectfully requests an order from this Commission
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23 ³ In communications with the City, NewPath has indicated that it believes that a CC&N is necessary for it to sell any
24 excess capacity it may have after installation of its DAS Network. The City does not believe that such is the case and it
25 should be noted that the City does not seek to intervene in these proceedings for the purpose of preventing NewPath from
conducting business in the City or elsewhere in this state.

26 ⁴ The City is aware that NewPath has apparently conceded in these proceedings that a CC&N does not prevent the
City from regulating aesthetic issues related to its proposed wireless communication facilities. However, as noted above,
NewPath has asserted that a CC&N will impact the City's ability to regulate the use of its rights-of-way.

1 granting permission for the City to intervene in these proceedings.

2 **RESPECTFULLY SUBMITTED** this 10th day of April, 2009.

3 **SCOTTSDALE CITY ATTORNEY'S OFFICE**

4
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11 **ORIGINAL** of the foregoing filed
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13 Arizona Corporation Administrative
14 Law Judge Yvette B. Kinsey

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EXHIBIT 3

ORIGINAL



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BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDA D. KENNEDY
BOB STUMP

2009 SEP 21 P 2 55

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

SEP 21 2009

DOCKETED BY

MW

IN THE MATTER OF THE APPLICATION OF
NEWPATH NETWORKS, LLC, FOR
APPROVAL OF A CERTIFICATE OF
CONVENIENCE AND NECESSITY TO
PROVIDE TRANSPORT AND BACKHAUL
TELECOMMUNICATIONS SERVICES.

DOCKET NO. T-20567A-07-0662

STAFF MEMORANDUM ON THE ISSUES
RAISED BY THE TOWNS OF PARADISE
VALLEY AND CAREFREE

I. INTRODUCTION

This proceeding involves a request by NewPath for a CC&N to provide transport and long haul telecommunications services to wireless customers and other large business entities in Arizona. Staff has recommended approval of the Company's CC&N Application. Certain members of the public appearing at the hearings before the Commission, as well as the Towns, have concerns regarding the towers that NewPath intends to construct and the degree to which those towers may interfere with the aesthetic appeal of their developments and communities.

The Towns of Carefree and Paradise Valley have also asserted that the Commission does not have jurisdiction over the services offered by NewPath, and therefore, should not grant NewPath a CC&N. The Towns are concerned that if NewPath obtains a CC&N it will acquire certain rights under Federal and Arizona law, and the Towns may lose their ability to control access to their rights-of-way and the pricing of that access. The Towns' arguments that the Commission lacks jurisdiction are multi-pronged, ranging from claims that the services offered by NewPath are not clothed with a public interest and hence NewPath is not a public service corporation under Arizona law, to arguments that the Commission has been preempted under Federal law (specifically, 47 U.S.C. § 332) from regulating any mobile services.

Staff disagrees with the Towns' arguments in this regard. The backhaul and transport services provided by NewPath are private lines services which the Commission regulates and has jurisdiction

1 over. The fact that portions of the service provided by NewPath utilize wireless technology does not
2 impact the Commission's jurisdiction over the private lines services offered by the Applicant.
3 Moreover, 47 U.S.C. § 332 is not applicable to the private line services offered by NewPath. 47
4 U.S.C. § 332 preempts the Commission's jurisdiction over "commercial mobile radio services" only
5 provided to retail end-user customers.

6 In the end, Staff believes that the Towns' concerns with NewPath's Application involve
7 issues outside of the Commission's jurisdiction, such as tower siting and payment for the use of the
8 Towns' rights-of-way. The Staff is hopeful that the Towns' and NewPath will still be able to reach a
9 settlement of their issues in this regard. In the event they are unable to reach agreement, the Staff
10 does not believe that the grant of a CC&N will interfere with the Towns' ability to control and
11 impose reasonable conditions on use of its rights-of-way. However, even if it does (which the Staff
12 does not agree that it does) this is simply not a valid basis for the Commission to not assert
13 jurisdiction over the private line services provided by NewPath.

14 II. PROCEDURAL HISTORY

15 On November 26, 2007, NewPath Networks, LLC ("NewPath" or "Company") filed with the
16 Arizona Corporation Commission ("Commission") an Application for a Certificate of Convenience
17 and Necessity ("CC&N") to provide transport and backhaul telecommunications services to wireless
18 carriers and other large business customers in Arizona. The Application was initially deemed
19 insufficient by Staff. Thereafter, Staff obtained additional information from the Applicant and the
20 Application was deemed to be sufficient. Staff filed a Report recommending approval of NewPath's
21 Application, subject to certain conditions, on October 31, 2008. On November 7, 2008, a Procedural
22 Order was issued setting a hearing in the matter for March 25, 2009, and establishing other
23 procedural deadlines.

24 On February 19, 2009, a hearing was held with NewPath, Staff and various public
25 commenters appearing. A second day of hearing was scheduled for April 27, 2009. On April 10,
26 2009, the Towns of Carefree and Paradise Valley, and the City of Scottsdale moved to intervene on a
27 late-filed basis. On April 17, 2009, the Towns' and City's interventions were granted.

1 Immediately before the hearing on this matter, the City of Scottsdale filed a Hearing
2 Memorandum challenging the Commission's jurisdiction in this matter. Both NewPath and Staff
3 requested an opportunity to respond to the Hearing Memorandum, and the hearing was delayed. On
4 June 10, 2009, the City of Scottsdale filed a Motion to Withdraw as a party and to Withdraw its
5 Hearing Memorandum, because it had settled its issues with NewPath. The City of Scottsdale's
6 requests to withdraw were subsequently granted by the Hearing Division by Procedural Order dated
7 June 30, 2009.

8 The Towns of Carefree and Paradise Valley filed their own briefs on the jurisdictional issues
9 and adopted the City of Scottsdale's Hearing Memorandum as well. Since that time, various
10 extensions of time have been granted, in part to allow NewPath and the Towns more time to try to
11 resolve their issues on an informal basis.

12 III. DISCUSSION

13 A. NewPath is a Public Service Corporation Under Arizona Law.

14 A public service corporation is defined in Art. 15 § 2 of the Arizona Constitution as:

15 All corporations other than municipal engaged in furnishing gas, oil, or
16 electricity for light, fuel or power; or in furnishing water for irrigation,
17 fire protection, or other public purposes; or in furnishing, for profit, hot
18 or cold air or steam for heating or cooling purposes; or engaged in
19 collecting, transporting, treating, purifying and disposing of sewage
20 through a system, for profit; or in transmitting messages or furnishing
public telephone or telephone service, and all corporations other than
municipal, operating as common carriers, shall be deemed public
service corporations.

21 In addition, Art. 15, § 9 of the Arizona Constitution recognizes that carriers engaged in the
22 transmission of messages for profit are also subject to regulation by the Commission as common
23 carriers.¹

24 The Arizona Courts employ an eight factor test to determine whether an entity is a public
25 service corporation.²

26 1. What the corporation actually does.

27 ¹ See *Iman v. Southern Pac. Co.*, 7 Ariz. App. 16, 435 P.2d 851 (App. 1968).

28 ² See *Natural Gas Service Co. v. Serv-Yu Cooperative, Inc.*, 70 Ariz. 235, 219 P.2d 324 (1950).

2. A dedication to the public use.
3. Articles of incorporation, authorization, and purposes.
4. Dealing with the service of a commodity in which the public has been generally held to have an interest.
5. Monopolizing or intending to monopolize the territory with a public service commodity.
6. Acceptance of substantially all requests for service.
7. Service under contract and reserving the right to discriminate is not always controlling.
8. Actual or potential competition with other corporations whose business is clothed with a public interest.

The following discussion examines these factors in light of NewPath's Application for a CC&N.

1. What the corporation actually does.

NewPath provides transport of telephone messages through the transport and backhaul of services to wireless carriers. The Company also provides transmission services to other landline and/or information providers. NewPath also intends to provide specialized private line services to entities such as apartment complexes, universities and hospitals.³ NewPath's provision of service fits within the definition of a public service corporation.

2. A dedication to the public use.

To meet this factor, "[A]n owner...must at least have undertaken to actually engage in business and supply at least some of his commodity to some of the public."⁴ Here there is no question that NewPath will offering its commodity to a portion of the public, including other carriers and large business entities. The Towns claim that NewPath does not meet this factor because "[t] record in this matter demonstrates that neither the rates, charges nor methods of operation of

³ See NewPath Brief in Response to Hearing Memorandums Submitted by Towns of Paradise Valley, Arizona and Carefree, Arizona at 6 ("NewPath Brief").

⁴ *Serv-Yu*, 70 Ariz. at 238, 219 P.2d at 326.

1 NewPath are a matter of public concern sufficient to warrant regulation by this Commission.”⁵
2 Simply because NewPath offers its services to other providers as well as large businesses does not
3 mean that its services are not clothed with a public interest. As the Court in *Serv-Yu* stated, “[t]his
4 much, doubtless, is true, that an owner of such plant must at least have undertaken to actually engage
5 in business and supply at least some of his commodity to some of the public.”⁶ NewPath’s services
6 meet this prong of the *Serv-Yu* test.

7 **3. Articles of incorporation, authorization, and purposes.**

8 While Staff is unaware of what the Company’s articles of incorporation provide, in
9 *Southwest Transmission Co-op, Inc. v. Arizona Corp. Comm’n.*,⁷ the Court found significant the fact
10 that Southwest Transmission Co-op’s (“SWTC”) purpose and intent was to provide service to the
11 public. Clearly, NewPath’s purpose and intent is to serve a portion of the public as well.

12 **4. Dealing with the service of a commodity in which the public has**
13 **been generally held to have an interest.**

14 In Arizona, as well as other states, the provision of telecommunications services is a
15 commodity in which the public has been generally held to have an interest. Thus, NewPath, in
16 providing transmission services to other carriers and large businesses is functioning in Arizona as a
17 public service corporation and a common carrier.

18 **5. Monopolizing or intending to monopolize the territory with a**
19 **public service commodity.**

20 Staff does not believe that there is any evidence in this proceeding to suggest that NewPath, in
21 providing service, intends to or will monopolize the territory with a public service commodity.
22 NewPath is seeking a CC&N to provide competitive telecommunications service.

23 **6. Acceptance of substantially all requests for service.**

24 NewPath has itself stated that it will accept substantially all requests for service.⁸
25 ...
26 ...

27 ⁵ Scottsdale Memorandum at 6.

28 ⁶ *Id.* at 327.

⁷ 213 Ariz. 427, 433, 142 P.3d 1240, 1246 (App. 2006).

⁸ See NewPath Brief at p. 8.

7. **Service under contracts and reserving the right to discriminate is not always controlling.**

NewPath does intend to utilize contracts or individual case base ("ICB") pricing in providing its services to customers.⁹ However, entering into private contracts was held not to be controlling.¹⁰ If entering into contracts with customers would control the determination whether an owner is a public utility or not, that would be an easy way of evading the law.¹¹ Further, many carriers that the Commission regulates utilize ICB pricing and they are still considered to be public service corporations.

8. **Actual or potential competition with other corporations whose business is clothed with a public interest.**

NewPath will be providing private line service in competition with other carriers regulated by the Commission. Such services are currently offered by interexchange carriers ("IXCs"), ILECs and CLECs in Arizona. The operations of all of these companies are clothed with a public interest, as are NewPath's operations.

There is little doubt that application of the *Serv-Yu* factors to this case, result in a finding that NewPath is a public service corporation.

B. **The Commission is Not Preempted by Federal Law From Regulating the Services Offered by NewPath.**

The Towns argue that the Commission is preempted by Section 332 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, (collectively the "Act") from regulating the Distributed Antenna Services ("DAS") that NewPath intends to use in part to provide its services.¹² 47 U.S.C. § 332(c)(3)(A) provides:

State preemption: (A) Notwithstanding section 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service.

⁹ NewPath Brief at 8.

¹⁰ *Serv-Yu* at 327.

¹¹ *Id.*

¹² Hearing Memorandum at p.2.

1 The Towns reason that since DAS is a mobile service, it falls within the purview of Section
2 332 of the Act and the Commission cannot regulate it.¹³ The Towns also argue that while the Act
3 allows a state to petition the FCC for permission to regulate mobile services, Arizona's petition was
4 denied in 1995.¹⁴

5 **C. Section 332 Does Not Apply to the Services Offered by NewPath.**

6 The Towns' arguments are misplaced for several reasons. First, the services that fall within
7 the purview of Section 332 are "commercial mobile radio services" and "private mobile services."

8 **1. NewPath is not a CMRS Provider.**

9 Commercial mobile radio services ("CMRS") are defined in Section 332(d) of the Act as
10 follows:

11 any mobile service...that is provided for profit and makes
12 interconnected service available (A) to the public or (B) to such classes
13 of eligible users as to be effectively available to a substantial portion of
the public, as specified by regulation of the Commission.

14 NewPath is not a CMRS provider nor is it a private mobile provider subject to the provisions
15 of Section 332. CMRS providers offer mobile radio service to the public, such as Verizon Wireless,
16 Sprint, Cricket, and AT&T. While NewPath may provide transport services to these CMRS
17 providers, it does not function as a CMRS provider itself. Further, while it is true that the
18 Commission is preempted from regulating the rates and entry of CMRS providers, it still has
19 jurisdiction over other terms and conditions of the service offered by CMRS providers.

20 **2. NewPath is Not a Private Mobile Provider.**

21 Nor is NewPath a private mobile service provider. A private mobile service provider is also
22 defined in Section 332(d) of the Act as:

23 Any mobile service...that is not a commercial service or the functional
24 equivalent of a commercial mobile service, as specified by regulation
of the Commission.

25 ...

26

27 ¹³ *Id.*

28 ¹⁴ *In the Matter of Petition of Arizona Corporation Commission, to Extend State Authority Over Rate and Entry
Regulation of All Commercial Mobile Radio Services and In the Matter of Implementation of Sections 3(n) and 332 of
the Communications Act, 1995 WL 316476 (1995).*

1 In a 1975 case, the D.C. Circuit Court of Appeals ("D.C. Circuit") discussed the difference
2 between public mobile radio service and private mobile service:

3
4 Such services are of two general types. Public services are operated by
5 common carrier licensees and made available to members of the public.
6 The most common type of public services are radio telephone services
7 which interconnect with existing telephone systems. Private services
8 apparently include all other mobile radio operations, i.e., those not
9 subject to common carrier regulation. They are predominantly dispatch
10 services such as those operated by police departments, fire departments,
11 and taxicab companies, for their own purposes. However, they are not
12 limited to services which an operator provides only to itself, but also
13 extend to services provided to a limited group of users by third party
14 operators.¹⁵

15
16 It is clear that the services offered by NewPath do not fall into either of these
17 categories. Further, as NewPath points out, CMRS and private mobile services are both
18 spectrum orientated. CMRS and private mobile services are offered from different portions
19 of the spectrum licensed by the FCC. NewPath points out that DAS is not spectrum
20 orientated and in fact NewPath does not own any wireless spectrum.¹⁶

21
22 All aspects of the wireless transmissions set or received through those
23 antennas are controlled by NewPath's wireless carrier customers,
24 including the frequency, the power, the technology used for encoding
25 signals and the content and timing of the signals. NewPath, therefore
26 does not provide a 'mobile service' as that term is defined under 47
27 U.S.C. Section 153(27).

28
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30 **3. Like Many Services, the Services Offered by NewPath Are Subject to
31 Regulation by Multiple Jurisdictions.**

32
33 Like many telecommunications services, the services offered by NewPath are subject to
34 regulation by multiple jurisdictions. The DAS services offered by NewPath are regulated by the
35 FCC. Neither the Town nor the Commission regulate the provision of DAS service per se. However,
36 to the extent that NewPath seeks to utilize the Towns' rights-of-way to erect its towers, it is subject to
37 regulation by the Towns. With respect to the Commission, to the extent NewPath utilizes a particular

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¹⁵ *NARUC v. FCC*, 525 F.2d 630 (D.C.Cir. 1975).

¹⁶ *Id.* 16.

1 technology to provide private line services to the public for profit; the provision of that service is
2 subject to the jurisdiction of the Commission.

3 Moreover, NewPath's private line service utilizes a variety of technologies, not just wireless
4 technology:

5 Similar to OnFiber, NewPath's DAS will provide specialized
6 telecommunications services...to transmit messages...via fiber optic cable. The DAS
7 system that NewPath builds and operates are private line services that provide
8 "backhaul" and transport services to both carriers and non-carriers. There is no
9 uniform definition for the term backhaul, but in this technological arena, it is often
10 used to describe the use of landlines, typically T-1 lines, but also fiber, for the
11 transmission of voice and data traffic between a cell site (or "node") and a switch, i.e.,
12 between a remote site and a central site. ...

13 While the details of each particular deployment vary, Newpath's transport
14 services generally involve the transport of voice and data traffic via fiber optic cables
15 between a remote "node" and customer operating equipment in a NewPath "hub"
16 location and frequently between such Hub and an MTSO. ...

17 Additionally, NewPath provides "backhaul services" that are unrelated to
18 NewPath's proposed DAS system. Indeed, NewPath has already secured a contract to
19 provide backhaul services to a wireless carrier in Arizona. In this scenario, NewPath
20 would be transporting carrier from an existing traditional cell site to a MSTO.
21 NewPath would deploy fiber as part of this service which would replace existing T1
22 lines that are currently leased, usually, from the incumbent local exchange carrier.
23 This T1 service is fairly expensive and carriers need additional capacity as end users
24 begin to subscribe to data plans taxing existing telecommunications networks.
25 Because fiber is more efficient and cost effective, NewPath fiber backhaul service
26 represents a needed alternative to T1 lines for wireless carrier and provides
27 competition to existing telecommunications providers in Arizona.

28 NewPath is also seeking authorization to provide private line service to non-
carriers. NewPath anticipates that it will deploy over 200 miles of fiber optic cable for
its Scottsdale project. Due to the increased efficiency and technical superiority of
fiber over copper lines, NewPath will be able to offer the excess capacity to
companies, institutions, campus environments and other interested persons seeking
private line service such as hospitals, universities, apartment complexes, government
entities and other users. ...¹⁷

Indeed, as NewPath points out in its Brief, it and other providers like it, have been certificated
by many states to provide the same services it seeks to offer in Arizona.¹⁸

¹⁷ NewPath Brief at 13-14.

¹⁸ NewPath Brief at 22-23 (...NewPath and its subsidiaries have sought and obtained authorization to provide telecommunications services from no less than 16 statewide agencies with regulatory authority over telecommunications providers and public utilities. ... Further, NewPath's competitor NextG Networks, has obtained statewide authority to operate in no less than 33 states and another DAS company, ExteNet, has obtained authorization in no less than 23 states. All together, 33 of the 50 states have asserted jurisdiction over DAS as a telecommunications service to date and to NewPath's knowledge, no statewide regulatory agency has held that it was preempted under federal law from regulating DAS.)

1 **D. NewPath's Request for a CC&N to Provide Competitive Telecommunications**
2 **Services Should be Granted.**

3 The Towns also argue that NewPath is not actually a competitive local exchange carrier
4 ("CLEC").¹⁹ First, the Towns' argue that NewPath "has not identified the actual number of
5 customers within the service area or the estimated number of customers to be served within the first
6 five years of operation as required by R14-2-502(A)(1)(g)."²⁰ This is merely a technical omission,
7 however, and one that is easily correctible by NewPath. NewPath not having provided this
8 information to the Commission or complied with the Commission's rules, does not mean that it is not
9 a CLEC. Second, the Towns' argue that NewPath has not explained "how it will provide local dial
10 tone service like CLEC's do and how it will comply with the interconnection requirements of R14-2-
11 1111 and R14-2-1112."²¹ But, not all CLECs provide "local dial tone service" or switched services to
12 their end-users. Some CLECs, such as NewPath provide non-switched services to their end-user
13 customers but this does not make them any less "CLECs" subject to the Commission's rules, then
14 those CLECs which provide switched services.

15 Finally, the Towns' claim that since Staff has not recommended that NewPath contribute to
16 the Arizona Universal Service Fund ("AUSF"), it is not truly a CLEC. The Commission's rules
17 dictate what carriers are required to contribute to the AUSF. To the extent that NewPath's services
18 fit within Category 1 (trunks interconnecting with the public switched telephone network) NewPath
19 would be required to contribute to the AUSF.

20 **E. The Towns' Concerns Cannot be Addressed by the Commission.**

21 The Towns' real concerns cannot be addressed by the Commission because they deal with
22 subject matter that fall outside the Commission's jurisdiction. For instance, Paradise Valley claims
23 that the issuance of a CC&N would allow NewPath to utilize its status as a public service corporation
24 to erect new above-ground cellular antenna in the Town's rights-of-way.²² Paradise Valley also urges
25 the Commission not to take any action that would conflict with the Town's long-standing policy of

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27 ¹⁹ Scottsdale Memorandum at 9.

28 ²⁰ *Id.* at 9.

²¹ Scottsdale Memorandum at 9.

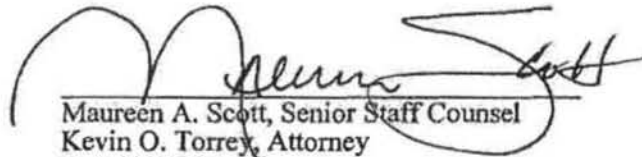
²² Paradise Valley Brief at 2-3.

1 prohibiting the installation of new aerial towers.²³ But, tower placement and siting issues are not
2 matters within the Commission's jurisdiction. Nor are they matters that should be resolved by the
3 Commission by denying NewPath's Application for a CC&N.

4 **IV. CONCLUSION**

5 NewPath is a provider of private line services and is a public service corporation under
6 Arizona law and subject to regulation by the Commission. The Commission should approve
7 NewPath's Application for a CC&N.

8 RESPECTFULLY SUBMITTED this 21st day of September, 2009.
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33 ²³ *Id.*

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**Before the
FEDERAL COMMUNICATIONS COMMISSION**

In the Matter of)
)
Petition of NextG Networks of)
California, Inc. for a Declaratory)
Ruling that its Distributed Antenna)
Service is Not Commercial Mobile)
Radio Service)

DECLARATION OF DAVID CUTRER

I, David Cutrer, declare as follows:

1. I am the Chief Technology Officer and Co-Founder of NextG Networks, Inc., which is the parent company of NextG Networks of California, Inc. ("NextG"), the Petitioner in the above-captioned proceeding. I make this Declaration in support of NextG's Petition for Declaratory Ruling in this proceeding. Unless otherwise indicated, I know the following of my personal knowledge.

2. I hold a Ph.D. and Masters degree in Electrical Engineering from the University of California at Berkeley, and a Bachelor of Science degree in Electrical Engineering and Applied Physics from the California Institute of Technology.

3. Prior to co-founding NextG, I was co-founder, Chief Technology Officer and Vice President of Engineering for LGC Wireless, Inc. I have been involved in the telecommunications industry, and particularly the wireless telecommunications industry, for over 10 years. Through my academic and employment experience, I have over 16 years of experience with the design, construction, and operation of both wireline and wireless telecommunications systems.

4. In my role at NextG, I am intimately familiar with the technical aspects of NextG's network and its provision of telecommunications services.

5. NextG provides telecommunications service over various fiber optic based networks. Most commonly, NextG has provided its telecommunications services via "Distributed Antenna Systems" ("DAS").

6. NextG is a "carriers' carrier." NextG's primary customers are commercial mobile radio service providers, such as AT&T Wireless, Verizon Wireless, T-Mobile, Sprint, MetroPCS, and Cricket.

7. NextG's telecommunications service consists of providing transport of NextG's customers' communications (both voice and data) between points designated by the customer without alteration of the communications. NextG's telecommunications service involves a communication signal handed off from NextG's customer to NextG at fixed points that NextG then transports over its fiber optic facilities. In the case of a NextG DAS configuration, NextG carries communications for its customers in two directions. In the case of a signal that originates with a retail end user's mobile device, this handoff from NextG's customer to NextG takes place at one end at and through equipment configurations called "Nodes" that are located on utility or streetlight poles located in the public rights-of-way or in private utility easements. The equipment comprising a typical Node in NextG's network includes a small, low-power antenna, laser and amplifier equipment for the conversion of radio frequency signals ("RF") to optical signals (or from optical to RF), fiber optic lines, and associated equipment such as power supplies. Each Node is limited to a specific location and can operate only at that location.

8. Once a carrier's RF signal traveling over the air from a mobile device reaches a Node, the signal is handed over to NextG from its carrier customer at the antenna, where the

signal is first converted to electric signals to be transported a few feet from the antenna to the equipment on the same pole that converts the signal to light waves. NextG's service then transports the communications through its fiber optic network to a distant point that is typically, but not always, an aggregation point typically called a "Hub." The Hub is located at a central location (typically its customer's Base Station) that contains such equipment as routers, switches, and signal conversion equipment. Each Hub is limited to a specific location and can operate only at that location. At the Hub, the communications being carried on light waves are converted back to an electric RF signal and handed back to NextG's carrier customer, where the communications signals are received by the customer's network at the carrier customer's Base Station. The carrier customer's Base Station equipment includes radio equipment that ultimately controls the radio frequency transmissions. NextG does not transmit or receive wireless, RF transmissions over the air, and NextG does not have any radios in its service or facilities. Rather, all radio transmissions and wireless services are controlled and provided by NextG's carrier customers through the carrier customer's equipment located at the Base Station.

9. Signals going in the opposite direction (*i.e.* originating at the Base Station and going out) follow the same path, only reversed. The equipment, in particular the radios, in NextG's carrier customer's Base Station originates signals that are handed off to NextG at the Hub. From the Hub, NextG transports the carrier customer's signals across NextG's fiber optic lines to the appropriate Node, which is at a location dictated by NextG's carrier customer. At the Node, the communication that has traveled along NextG's fiber optic lines is placed into an electrical format for transport the few feet up coaxial cable on the pole to reach the antenna, and at the antenna the signal is converted into free-space radio waves that are handed off to the wireless carrier customer, which in turn transmits the signals to its retail end users' mobile

devices. The emission of the radio signals is controlled by NextG's carrier customer through the radio equipment located at the carrier customer's Base Station. NextG does not provide or control radio transmissions between the Node and a carrier customer's subscriber's mobile device.

10. NextG's telecommunications service is no different from, and indeed competes directly with, the fiber-based backhaul/private line services provided to wireless carriers by Incumbent Local Exchange Carriers ("ILECs") and other competitive fiber companies. I know that NextG competes with ILECs and other competitive fiber companies to provide its services to wireless carriers.

11. The Node equipment, including the antenna at the Node, is integral to NextG's service and network. NextG can and does provide the same transport service to multiple wireless carriers using the same antenna(s) on a single DAS network.

12. Although a "DAS" network is currently the most common configuration of NextG's network, NextG can and does provide the same transport service for wireless carriers using other "Small-Cell Solution" configurations, as well as traditional "backhaul" transport from carriers' base stations to other aggregation points. In no case does NextG provide service to retail wireless customers or control radio transmissions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2011



David Cutrer

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

In the Matter of

Petition of NextG Networks of
California, Inc. for a Declaratory
Ruling that its Distributed Antenna
Service is Not Commercial Mobile
Radio Service

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DECLARATION OF ROBERT L. DELSMAN

I, Robert L. Delsman, declare as follows:

1. I am the Senior Vice President for Government Relations and Regulatory Affairs for NextG Networks, Inc., which is the parent company of the Petitioner in the above-captioned proceeding, NextG Networks of California, Inc. ("NextG"). I make this Declaration in support of NextG's Petition for Declaratory Ruling in this proceeding. Unless otherwise indicated, I know the following of my personal knowledge.

2. NextG provides telecommunications service over various fiber optic based networks. Most commonly, NextG has provided its telecommunications services via "Distributed Antenna Systems." NextG's thousands of miles of fiber optic lines create a network that NextG uses to transport the signals of multiple wireless carrier customers.

3. NextG has been seeking to install its DAS facilities in the City of Scottsdale, Arizona since March 2009. In response to NextG's requests to install its DAS facilities in the City, the City informed NextG that, among other requirements, NextG would be required to pay the City an annual amount ("Encroachment Permit Fee") for each of the "Nodes" located in the public rights of way.

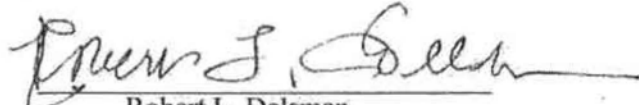
4. The operating subsidiaries of NextG Networks, Inc., which include Petitioner NextG, have received authorization similar to a Certificate of Convenience and Necessity, or the equivalent thereof, to provide telecommunications services in thirty five (35) states, including Arizona, and the District of Columbia and Puerto Rico. Plaintiff NextG, specifically, has received authorization from ten state commissions, including Arizona, California and Oregon.

Copies of the certificates or their equivalent are publically available on NextG's website at

<http://www.nextgnetworks.net/corporate/regulatoryaffairs.html>.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2011


Robert L. Delsman